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INTRODUCTION

When Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)[1] in 1970 to curb the infiltration of organized crime into legitimate business, it resurrected an old common law punishment: *in personam* asset forfeiture.[2] As originally enacted, RICO mandated that upon conviction a defendant had to forfeit all of his assets that were "tainted" by a connection with the crime.[3] Any proceeds derived from or involved with the racketeering activity would be deemed tainted and thus potentially forfeit-

1. Organized Crime Control Act of 1970 (RICO), Pub. L. No. 91-452, §§ 1961-68, 84 Stat. 922, 941, 943. For background information on RICO, see Tracey Doherty et al., Project, *Racketeer Influenced and Corrupt Organizations,* 31 AM. CRIM. L. REV. 769 (1994). For additional but somewhat outdated background on RICO, see G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009 (1980). Blakey and Gettings provide an especially comprehensive analysis of the legislative history surrounding RICO's enactment in 1970. *Id.* at 1014-21. Their insight is particularly valuable because they both had substantial involvement in the drafting of RICO. Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures at the time RICO was enacted, and Gettings was Counsel and Director of the House Republican Conference Task Force on Crime during the period in which RICO's legislative precursors were considered.

2. For a discussion of the historical developments in forfeiture law, see Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?,* 53 U. PITT. L. REV. 1, 6-13 (1991) and Michael Todd King, Note, *Expanding the Courts' Power to Preserve Forfeitable Assets: The Pretrial Restraint of Substitute Assets Under RICO and CCE,* 29 GA. L. REV. 245, 247-50 (1994).

The use of forfeiture as a criminal sanction has its roots in ancient Greek, Roman, and Judaic law. *See* Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of* Princeton/Newport, 65 NOTRE DAME L. REV. 1009, 1009 n.2 (1990). Although *in personam* forfeitures were relatively frequent at early common law, they essentially disappeared as a form of punishment in American courts during the nineteenth century, until readopted by RICO in 1970. *See* Palm, *supra,* at 10-11.

There are two types of forfeiture orders: *in personam* and *in rem*. *In personam* forfeiture actions are imposed on the defendant as a form of punishment. The defendant must first be convicted of a crime before forfeiture may be ordered. *In rem* forfeiture, on the other hand, involves a proceeding against the property itself, and thus does not require a conviction as a predicate event. RICO's forfeiture provisions are *in personam*, since they are entered against the defendant only after a conviction. *Id.* at 6-7.

3. The original RICO forfeiture provision provided that upon conviction, a defendant:

> shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

RICO, § 1963(a), 84 Stat. 922, 943 (amended by the Comprehensive Forfeiture Act of 1984, ch. 3, sec. 302, § 1963(a), Pub. L. No. 98-473, 98 Stat. 1837, 2040).

able upon a finding of guilt. For example, if an individual earned ten thousand dollars from his participation in racketeering and subsequently used the funds to purchase an automobile, it would be subject to forfeiture upon conviction as tainted property. Moreover, in order to ensure that the defendant's property would be obtainable in the event of a forfeiture order, RICO included a limited pretrial restraint provision permitting courts to enter restraining orders against assets potentially subject to forfeiture.[4]

In the Comprehensive Forfeiture Act (CFA) of 1984,[5] Congress significantly amended RICO's forfeiture section in an effort to bolster the war against organized crime by attacking its economic base. In the CFA, Congress responded to concerns that prosecutors underutilized RICO's forfeiture provisions.[6] A principal feature of this attempt to promote the use of asset forfeiture was the expansion of RICO's pretrial restraint powers. Before the 1984 Act, courts could order restraints only after the filing of an indictment or information.[7] Because defendants were often aware of potential RICO prosecutions before formal charges were brought, they were usually able to protect their tainted assets from forfeiture by concealing them from the court.[8] Congress addressed this problem in 1984 by amending RICO's pretrial restraint provision to permit the imposition of restraints before an indictment or information.[9]

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4. RICO originally permitted district courts "to enter restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper." RICO, § 1963(b), 84 Stat. 922, 943 (amended by the Comprehensive Forfeiture Act of 1984, ch. 3, sec. 302, § 1963(b), Pub. L. No. 98-473, 98 Stat. 1837, 2040-41; current version at 18 U.S.C. § 1963(d) (1984)).

5. Pub. L. No. 98-473, 98 Stat. 1837, 2040 (1984) (codified as amended at 18 U.S.C. § 1963).

6. S. REP. No. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374. The Senate report discusses a 1981 General Accounting Office study that attributed the underutilization problem in large measure to the forfeiture provisions' numerous limitations. *Id.* The report asserts that "[t]his bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." *Id.* at 3375; *see also* United States v. Nichols, 841 F.2d 1485, 1488 (10th Cir. 1988) (discussing the limitations inherent in RICO's original forfeiture provisions).

7. In the federal system, an indictment by grand jury is required before any felony prosecution. Informations are filed as an alternative charging instrument where the defendant has waived his right to a grand jury. The primary difference between an indictment and an information is its source. Grand juries issue indictments, but informations are issued by a prosecutor. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 25 (2d ed. 1992).

8. *See* S. REP. No. 225, *supra* note 6, at 202, *reprinted in* 1984 U.S.C.C.A.N. at 3385; *see also Nichols*, 841 F.2d at 1488-89 (attributing the ineffectiveness of RICO's forfeiture sanctions during the 1970s in large measure to the government's policy of routinely notifying defendants of pending grand jury investigations, which enabled such individuals to transfer or conceal assets before an indictment was returned).

9. RICO's pretrial restraint provision has remained substantially unchanged since the 1984 Act. The 1984 amendment was enacted as subsection (e), but in 1986 Congress redesignated it as subsection (d). *See* Criminal Law and Procedure Technical Amendment

Two years later, Congress again amended RICO to provide for the forfeiture of assets unconnected with the RICO offense when the defendant's tainted assets are unavailable.[10] For instance, a person convicted of a racketeering offense may have purchased a home years before the crime took place with money earned from a legitimate job. Under the so-called substitute asset provision, such property is available for forfeiture when assets directly tainted by the crime are unavailable at the time of conviction. As with the 1984 expansion of pretrial restraints, this substitute asset provision sought to strengthen RICO's forfeiture powers by enabling courts to enter forfeiture orders even when the defendant had successfully concealed his tainted assets.

Although it is clear that substitute assets are forfeitable after conviction, there is considerable uncertainty in the federal courts about whether substitute assets may be subjected to pretrial restraint. RICO's pretrial restraint provision explicitly applies to tainted property, but it is silent regarding substitute assets.[11] Both the Second[12] and Fourth[13] Circuits have ruled that RICO's pretrial restraint measures may be applied to substitute assets. The Third Circuit has disagreed, refusing to apply RICO's pretrial restraint provision to substitute assets.[14]

Act of 1986, Pub. L. No. 99-646, sec. 23(3), § 1963, 100 Stat. 3592, 3597. This Note shall refer to the pretrial restraint provision by its current location, subsection (d).

10. 18 U.S.C. § 1963(m) (1988). The substitute asset provision was originally enacted in subsection (n), but two years later Congress redesignated it as subsection (m). *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7034(b), § 1963(d), 102 Stat. 4181, 4398. As with the pretrial restraint provision, this Note shall refer to the substitute asset provision by its current location, subsection (m).

11. Section 1963(d)(1) permits courts to "take . . . action to preserve the availability of property described in subsection (a) for forfeiture." 18 U.S.C. § 1963(d)(1) (1988). Subsection (a) describes tainted property. *See infra* text accompanying note 26 for the text of subsection (a).

12. *See* United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988). In remanding consideration of a restraining order to the district court, the Second Circuit advised that if the nature of the defendant's potentially forfeitable property was such that the entry of pretrial restraints would prove burdensome on third parties, the district court could restrain substitute assets instead.

13. *See In re* Billman, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied sub nom.* McKinney v. United States, 500 U.S. 952 (1991). In *Billman*, the defendant had transferred $22,000,000 earned in violation of RICO to a Swiss bank account and then fled the country shortly before the grand jury returned an indictment against him. While out of the country, the defendant transferred approximately $500,000 to a third party in the United States. After uncovering evidence of this transfer, the government sought a restraining order on the $500,000. Because the government was unable to prove that the transferred funds were actually RICO proceeds, the district court, and the Fourth Circuit on appeal, assumed that the money was not connected with the defendant's illegal conduct. The Fourth Circuit nevertheless concluded that the restraint was permissible.

14. *See In re* Assets of Martin, 1 F.3d 1351, 1359 (3d Cir. 1993). *Martin* arose from the government's investigation of certain schemes to evade excise taxes on diesel fuel in violation of RICO. Concerned that the targets of the investigation would transfer or conceal potentially forfeitable assets, the government successfully sought the entry of various preindictment restraining orders, claiming that there was in excess of $15,000,000 in forfeitable

A similar controversy about the propriety of the pretrial restraint of substitute assets has arisen under the Continuing Criminal Enterprise statute (CCE).[15] The forfeiture provisions of the CCE are essentially identical to those of RICO.[16] As with RICO, federal courts disagree as to whether the CCE's pretrial restraint measures extend to substitute assets. The Fifth[17] and Ninth[18] Circuits have held that the statute's pretrial restraint provision does not reach substitute assets.[19] By contrast, several district courts in other circuits have permitted the application of the CCE's pretrial restraint measures to substitute property.[20] Because courts generally treat

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proceeds. The subsequent indictment, however, alleged that only $6,000,000 were forfeitable profits. The difference between these sums thus had no demonstrated connection to the RICO offense and was deemed to be substitute assets. The *Martin* court concluded that restraints could not be entered on the portion of the money that had no known connection with the illegal activity. 1 F.3d at 1362.

15. 21 U.S.C. § 848 (1988). The forfeiture provisions of the CCE are found in 21 U.S.C. § 853 (1988). The forfeiture section of the CCE is also used for the crimes for which forfeiture is authorized by the United States' general criminal forfeiture statute, 18 U.S.C. § 982 (1982). Section 982 incorporates by reference § 853.

16. *See, e.g.*, United States v. Ripinsky, 20 F.3d 359, 362 n.3 (9th Cir. 1994) (observing that "[t]he provisions of § 853 are substantially identical to RICO's criminal forfeiture provisions found at 18 U.S.C. § 1963"); United States v. Reckmeyer, 631 F. Supp. 1191, 1195 n.2 (E.D. Va. 1986) (concluding that "18 U.S.C. § 1963 is . . . a mirror of 21 U.S.C. § 853"); S. REP. No. 225, *supra* note 6, at 209, *reprinted in* 1984 U.S.C.C.A.N at 3392 (noting that the 1984 amendments to the CCE's forfeiture provisions are "in nearly all respects, identical to the RICO criminal forfeiture statute as amended"). The CCE's tainted assets provision is found at § 853(a); its pretrial restraint measures are found at § 853(e); and its substitute asset provision lies at § 853(p). The principal difference between the RICO and CCE statutes is that only the CCE statute has a rebuttable presumption provision, which requires the government to meet a preponderance of the evidence standard to obtain a forfeiture. *See* United States v. Elgersma, 971 F.2d 690, 696 (11th Cir. 1992) (discussing this difference). This distinction is not relevant to this Note's discussion of pretrial restraint powers.

17. *See* United States v. Floyd, 992 F.2d 498, 501 (5th Cir. 1993). In *Floyd,* the defendant, a former bank president, conspired to loan a total of $1,960,000 to a real estate developer in exchange for a $450,000 payoff. The loans exceeded the bank's lending limits, and in an attempt to keep these loans secret, the defendant violated several other banking laws. Upon the issuance of an indictment, the government sought the entry of CCE's § 853(e)(1)(A) restraints for up to $1,960,000, claiming that this amount would be subject to forfeiture in the event of a conviction. The government acknowledged that the defendant did not actually have the tainted $1,960,000 in his possession and that the restrained money would be substitute assets. The district court agreed that it could impose pretrial restraints on substitute assets but limited its restraining order to the $450,000, because it was not convinced that the full $1,960,000 would be forfeitable upon conviction. 992 F.2d at 499. On appeal, the Fifth Circuit vacated the district court's order.

18. *See Ripinsky,* 20 F.3d at 363. In *Ripinsky,* the government sought a restraining order of over $1,000,000 against of the defendant who was facing prosecution for fraudulent activities. It was undisputed that the money in question had no connection to the illegal conduct. The Ninth Circuit denied the request.

19. In addition, one district court in the Eighth Circuit has declined to extend § 853's pretrial restraint powers to substitute assets. *See* United States v. Field, 867 F. Supp. 869, 873 (D. Minn. 1994).

20. *See* United States v. O'Brien, 836 F. Supp. 438, 441 (S.D. Ohio 1993); United States v. Wu, 814 F. Supp. 491, 493 (E.D. Va. 1993); United States v. Swank Corp., 797 F. Supp. 497, 500-502 (E.D. Va. 1993); United States v. Skiles, 715 F. Supp. 1567, 1568 (N.D. Ga. 1989). In addition, a magistrate in the eastern district of Wisconsin has permitted the imposition of

the forfeiture provisions of RICO and the CCE as interchangeable,[21] this Note relies on the case law of both statutes; for the sake of simplicity, however, its discussion is limited to whether courts may order the pretrial restraint of substitute assets under RICO.[22]

This Note argues that courts should not apply RICO's pretrial restraint measures to substitute assets. Part I examines the text of RICO's forfeiture provisions in light of recent rulings by the Supreme Court providing guidance in interpreting the statute. Part I concludes that the statute's plain meaning limits pretrial restraint measures to tainted assets. Part II examines language in the legislative history of an earlier attempt to add a substitute asset provision to RICO and in the 1984 change from broad to specific language in the pretrial restraint provision. From this language, Part II concludes that Congress did not intend for the pretrial restraint provision to apply to substitute assets. Finally, Part III examines the difference between tainted and substitute assets in light of the greater concern for defendants' property rights that is manifested in the earlier stages of RICO prosecutions. Part III contends that the potential hardships associated with restraining orders and the risk of erroneous deprivation are good reasons for differentiating between tainted and substitute assets for purposes of pretrial restraints. This Note concludes that when a court finds that a portion of a defendant's tainted assets is unavailable before trial, it should not try to compensate for this missing sum by restraining substitute assets.

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§ 853's pretrial restraint measures upon substitute assets. *See* United States v. Schmitz, 153 F.R.D. 136, 141 (E.D. Wis. 1994).

21. RICO and the CCE were both originally enacted as part of the same bill in 1970. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 943. In 1984, the CFA amended § 853 in the same fashion as § 1963. *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, sec. 413, § 853, 98 Stat. 1837, 2044-45. In fact, § 853's legislative history incorporates § 1963's legislative record. In discussing the amendments to § 853's pretrial restraint provisions, the 1984 Senate report refers the reader to the discussion of RICO's pretrial restraint measures. *See* S. REP. No. 225, *supra* note 6, at 213, *reprinted in* 1984 U.S.C.C.A.N. at 3396. Consequently, courts and commentators treat forfeiture issues arising under RICO and the CCE as interchangeable. *See, e.g., Ripinsky*, 20 F.3d at 362 n.3 (asserting that "[w]e therefore refer to cases and legislative history discussing § 1963 and § 853 interchangeably"); *In re* Martin, 1 F.3d 1351, 1358 (3d Cir. 1993) (treating cases dealing with RICO's forfeiture provisions as relevant precedent for an issue arising under § 853); *In re* Moffitt, Zwerling & Kemler, 864 F. Supp. 527, 532 n.10 (E.D. Va. 1994) (concluding that it is settled that "decisions interpreting the RICO forfeiture provisions are persuasive authority on the interpretation and application of § 853"); Palm, *supra* note 2, at 2 n.2 ("[T]he judicial decisions concerning forfeiture under the CCE are generally instructive with respect to the counterpart provisions in RICO.").

22. Given the similarities between § 1963 and § 853, the conclusions this Note reaches with regard to RICO should logically apply to the CCE's forfeiture provisions as well.

I. The Plain Language of RICO's Forfeiture Provisions

The Supreme Court has held that construction of RICO, like construction of other statutes, should begin by looking at the language of the statute.[23] Unambiguous language is conclusive in the absence of a clearly expressed legislative intent to the contrary.[24] This Part examines the statutory language of RICO's forfeiture section to determine whether courts may enter restraining orders against substitute property. Section I.A focuses on section 1963(d), the pretrial restraint provision, and concludes that the wording of this subsection unambiguously indicates that RICO's pretrial restraint measures do not apply to substitute assets. Section I.B considers the language and structure of the entire forfeiture section to provide a meaningful context for the specific language of section 1963(d). This section concludes that reading the statute as a whole confirms the view that section 1963(d) is not designed to apply to substitute assets. Finally, section I.C argues that RICO's liberal construction mandate does not alter this statutory analysis. This Part concludes that the statutory language of section 1963 indicates that RICO does not provide for the pretrial restraint of substitute assets.

A. *An Examination of RICO's Pretrial Restraint Provision*

Section 1963(d), RICO's pretrial restraint provision, states that a court may enter a restraining order "to preserve the availability of property described in *subsection (a)* for forfeiture."[25] Subsection (a) defines tainted assets and makes no reference to substitute assets:

> (1) any interest the person has acquired or maintained in violation of section 1962;
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> (2) any —
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
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> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

23. *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (citing Consumer Prod. Safety Commn. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

24. 452 U.S. at 580.

25. 18 U.S.C. § 1963(d)(1) (1988) (emphasis added).

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.[26]

Substitute assets are defined in subsection (m) as any property of the defendant not already identified as a tainted asset under subsection (a).[27] Thus, RICO's pretrial restraint measure refers only to subsection (a) — the tainted asset subsection, not subsection (m) — the substitute assets subsection. The plain language of this provision therefore appears to preclude the application of pretrial restraints to substitute assets.[28]

In *United States v. Monsanto,*[29] the Supreme Court emphasized the importance of interpreting forfeiture and restraint provisions consistently with their plain language. In *Monsanto,* the district court had entered a restraining order, as provided by section 853(e)(1)(A) of the CCE, on property the defendant allegedly had accumulated in the course of narcotics trafficking.[30] The defendant moved to vacate the restraining order so that he could use the frozen funds to retain counsel. He argued that the forfeiture provisions of the CCE should be interpreted to include an exemption for assets used to pay an attorney. The Court rejected this argument, emphasizing that nowhere in the CCE's forfeiture section was there any recognition of an exemption for attorney's fees.[31] In response to contentions that such a ruling ran counter to Congress's intent, the Court stressed the plain meaning of the statute and stated that "the statute, as presently written, cannot be read any other way."[32]

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26. 18 U.S.C. § 1963(a) (1988).

27. In full, subsection (m) reads:

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant —

(1) cannot be located upon the exercise of due diligence;
(2) has been transferred or sold to, or deposited with, a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value; or
(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1963(m) (1988).

28. *See* United States v. Floyd, 992 F.2d 498, 502 (5th Cir. 1993). The *Floyd* court found that the statute "plainly states what property may be restrained before trial. Congress made specific reference to that property described in § 853(a) [equivalent to section 1963(a)], and that description does not include substitute assets." 992 F.2d at 502.

29. 491 U.S. 600 (1989).

30. 491 U.S. at 602-04.

31. 491 U.S. at 606-14.

32. 491 U.S. at 614. Although the *Monsanto* Court reached a strong conclusion with respect to the statutory language's plain meaning, the opinion nevertheless seemed to rely on policy grounds as well. The Court remarked that "[p]ermitting a defendant to use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs cannot be sanctioned." 491 U.S. at 613. The Fourth Circuit has pointed to this language as providing support for the pretrial restraint of substitute assets. *See In re*

Likewise, section 1963(d)(1) refers *only* to tainted assets as property subject to pretrial restraints, and cannot be read any other way.

B. *Examining the Statute as a Whole*

Examination of the plain meaning of RICO's pretrial restraint provision is only the first step in determining its meaning; the statute must also be read as a whole to provide a context for the plain language of section 1963(d).[33] RICO's forfeiture provisions, when read as a whole, reveal that the statute treats tainted assets and substitute assets as two entirely distinct forms of property.[34] When adding a substitute asset provision to RICO, Congress did not simply amend section 1963(a) to allow for the forfeiture of any other property in the event that the defendant's tainted funds proved unavailable. Although Congress initially considered such an approach,[35] it ultimately decided to add a new subsection detailing when substitute assets may be forfeited.[36]

Billman, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied sub nom.* McKinney v. United States, 500 U.S. 952 (1991). However, the *Billman* court's reliance on this language is misplaced. *Monsanto*'s statement is merely dictum, and the crux of the Court's reasoning is that the statutory language of § 853 does not specifically provide an exemption for attorneys' fees. The *Monsanto* Court discusses policy concerns only as a response to the claim that its reliance on the plain language of the statute produced a result that is contrary to legislative intent. 491 U.S. at 610, 613. By observing the strong policy reasons for denying the exclusion, the Court strengthens its contention that the plain language of the statute reveals that Congress intended for the restraint of funds which the defendant seeks to use to retain counsel.

33. The Supreme Court has ruled that "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). *See also* United States v. Schmitz, 153 F.R.D. 136, 140 (E.D. Wis. 1994). *See generally* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.").

34. *See* Graeme W. Bush, *The Impact of RICO Forfeiture on Legitimate Business,* 65 NOTRE DAME L. REV. 996, 1007 (1990). Bush criticizes the argument that the substitute asset amendment merely clarified already existing powers under § 1963 by pointing out that this notion "disregards the structure of the statute, which distinguishes between the treatment of subsection (a) assets and substitute assets under subsection (m)." *Id. See also* United States v. Ripinsky, 20 F.3d 359, 365 n.8 (9th Cir. 1994) (commenting that the statute "distinguishes between 'forfeitable' and 'substitute' assets").

35. The first time Congress contemplated a substitute asset provision, the proposed amendment simply created a clause at the end of subsection (a) which permitted courts to reach any other property of the defendant when the tainted assets were unavailable. *See* S. REP. No. 307, 97th Cong., 1st Sess. 995 (1981). However, the proposed substitute asset amendments of 1982 and 1984 and the ultimately successful enactment in 1986 all refused to adopt this approach, instead preferring to add the provision in a distinct subsection.

36. 18 U.S.C. § 1963(m) (1988); *see* United States v. Floyd, 992 F.2d 498, 502 (5th Cir. 1993) ("[T]he property described in § 853(a) [equivalent to section 1963(a)] . . . does not include substitute assets. Congress treated substitute assets in a different section, § 853(p) [equivalent to section 1963(m)].").

Moreover, RICO treats tainted and substitute assets differently, taking a far more cautious approach toward substitute assets. Whereas tainted assets are *automatically* forfeitable upon conviction, RICO provides that the substitute asset provision is intended as only a last-resort measure. Congress could simply have provided for the forfeiture of an amount of money from the defendant's assets equivalent to that involved in the criminal activity, regardless of whether the property that would ultimately be forfeited had any connection with the offense.[37] Instead, the statute directs courts first to order the forfeiture of assets that have some nexus with the RICO violation.[38] Courts may only turn to the substitute asset provision when some or all of this tainted property is unattainable.[39]

Furthermore, even after the prosecution establishes that some portion of a defendant's tainted assets is unavailable for forfeiture, subsection (m) specifies two additional requirements that must be satisfied before courts may order the forfeiture of substitute assets. First, one of five conditions precedent must be met. Courts may invoke subsection (m)'s substitute asset provision *only* where the tainted property cannot be located by a reasonably diligent search,[40] is now in the hands of a third party,[41] lies beyond the jurisdiction of the court,[42] has been substantially diminished in value,[43] or has been commingled with other property such that it cannot be separated without difficulty.[44] Thus, only certain justifications for the failure to reach tainted assets provide adequate grounds for the forfeiture of substitute assets.

Second, subsection (m) also provides that courts may only order the forfeiture of substitute assets where an "act or omission of the

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37. Such an approach would not be entirely novel, for the Seventh Circuit appears to advocate a similar theory in United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985). *Ginsburg* involved a RICO prosecution before the 1986 enactment of a substitute asset provision. The defendant argued that the United States' interest in forfeiture was limited to the amount that the defendant still had in his possession upon conviction or that the government bore the burden of proving that the assets sought for forfeiture were the same as those obtained in violation of RICO. 773 F.2d at 801. The Seventh Circuit rejected these arguments, advancing the following theory:

> What the defendant's argument overlooks is the fact that a racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women, and song has profited from organized crime to the same extent as if he had put the money in his bank account. Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment, college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes.

773 F.2d at 802.

38. *See* 18 U.S.C. § 1963(m) (1988).

39. 18 U.S.C. § 1963(m) (1988).

40. 18 U.S.C. § 1963(m)(1) (1988).

41. 18 U.S.C. § 1963(m)(2) (1988).

42. 18 U.S.C. § 1963(m)(3) (1988).

43. 18 U.S.C. § 1963(m)(4) (1988).

44. 18 U.S.C. § 1963(m)(5) (1988).

defendant" makes the tainted property unavailable.[45] This "act or omission" requirement presumably indicates that the defendant must have been a proximate cause of the unavailability of the assets.[46] By contrast, the forfeiture of tainted assets is automatic upon conviction. This limitation of RICO's substitute asset provision is quite significant when one recognizes that the defendant has already been convicted at this point in the process, and thus there is no need for the more cautious treatment that is ordinarily accorded to those merely accused of a crime.[47] Consider, for example, the defendant who is convicted of a RICO offense and owns a house that is deemed to be tainted under section 1963(a). If a sudden catastrophe completely destroys this property, and the defendant was unable to purchase insurance for such an event, the government cannot turn to RICO's substitute asset provision as a means of compensating for this loss. Even though the defendant has been found guilty of a racketeering crime, Congress would prefer that the government be unable to collect the full amount owed to it, rather than force the defendant to make up the difference out of untainted funds.

The distinction RICO makes between substitute and tainted assets demonstrates that the tainted asset provision should not be read as implicitly referring to the substitute asset provision. In *United States v. Schmitz*,[48] however, the magistrate judge criticized other courts that began with the initial assumption that subsection (a) does not include substitute property.[49] Instead, the court in *Schmitz* reasoned that the substitute asset provision was designed to supplement subsection (a).[50] The court attributed subsection

45. 18 U.S.C. § 1963(m) (1988).

46. Of course, the "act or omission" requirement could be read so broadly that it would almost always be satisfied. For instance, if tainted assets in the possession of a defendant were stolen by a third party, one might argue that the defendant "omitted" to protect adequately the property from theft and that therefore the government should be permitted to seize substitute assets.

Such a broad reading, however, would render meaningless Congress's restriction on the forfeiture of substitute assets to situations where tainted assets are unavailable due to an "act or omission" of the defendant, because courts could *always* trace the unavailability to some act or omission of the defendant. Given that Congress presumably had good reason for including this restriction, courts should not nullify it by interpreting it too broadly.

47. *See infra* notes 89-90 and accompanying text (discussing the presumption of innocence and its impact on preconviction proceedings).

48. 153 F.R.D. 136 (E.D. Wis. 1994).

49. *Schmitz* cites *In re* Martin, 1 F.3d 1351 (3d. Cir. 1993) and United States v. Floyd, 992 F.2d 498 (5th Cir. 1993) as presuming that the tainted asset provision does not include substitute assets. 153 F.R.D. at 139. In fact, in *Floyd*, the government was willing to stipulate that subsection (a) does not also contain substitute assets. 992 F.2d at 501.

50. 153 F.R.D. at 139. The court actually reasoned that the substitute asset provision was designed to "supplant" the tainted asset provision. Given that both subsections still exist, subsection (m) clearly did not wholly replace subsection (a); hence, the court's use of "supplant" probably should not be read literally. It makes sense, therefore, to read *Schmitz* as arguing that subsection (m) *supplemented* subsection (a).

(a)'s failure to mention substitute property to chronology, noting that subsection (a) was enacted years before the addition of a substitute asset provision.[51] The court concluded that because subsection (m) was intended to supplement subsection (a), any reference to subsection (a) property necessarily includes substitute assets as well.

The *Schmitz* court's argument fails because RICO treats substitute and tainted assets as two entirely separate forms of property. Nowhere in RICO's forfeiture provisions is there evidence that Congress intended the substitute asset measure to supplement the tainted asset subsection. If Congress had designed the 1986 substitute asset amendment to supplement the tainted asset provision, as *Schmitz* suggests, it could have simply amended subsection (a) to provide for a substitute asset clause, as discussed above.[52] In the alternative, Congress could easily have added language to the substitute asset provision stating that it incorporates subsection (a) by reference. Instead, Congress drafted RICO's forfeiture provisions keeping substitute assets distinct from tainted assets, and the statute treats the two forms of assets differently.

In purporting to read RICO in its entirety, the court also found that one of RICO's purposes is to preserve all forfeitable assets and therefore concluded that the pretrial restraint provision must implicitly include substitute assets. The court reasoned that this preservation purpose authorized the pretrial restraint of substitute assets, because "[t]o conclude otherwise would eviscerate the intent of the criminal forfeiture statute."[53] The Fourth Circuit apparently reached a similar conclusion in In re *Billman*.[54] In *Billman*, the court emphasized that the purpose of RICO's pretrial restraint measure is the preservation of assets that may ultimately be forfeited upon conviction.[55] Much like the court in *Schmitz*, the Fourth Circuit concluded that it must read RICO's pretrial restraint provision as implicitly referring to substitute assets so that "the purpose of § 1963(d)(1)(A) can be attained."[56]

This attempt to read a preservation purpose into RICO's forfeiture provisions in order to permit courts to enter pretrial restraints against substitute assets cannot overcome the statute's plain language and structure. They reveal an intent to preserve the availability of certain assets for ultimate forfeiture upon conviction. Yet,

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51. 153 F.R.D. at 139.

52. *See supra* notes 35-36 and accompanying text.

53. 153 F.R.D. at 140.

54. 915 F.2d 916 (4th Cir. 1990), *cert. denied sub nom.* McKinney v. United States, 500 U.S. 952 (1991).

55. 915 F.2d at 921.

56. 915 F.2d at 921.

as the language of subsection (d)(1) makes clear, this preservation intent extends only to tainted assets.[57]

Moreover, even if it were sensible to read the purpose of section 1963 as preserving *all* forms of assets for ultimate forfeiture, such a reading would not authorize courts to allow for the pretrial restraint of substitute assets. The Court's decision in *United States v. Monsanto*[58] indicates that the plain language of RICO, which limits the pretrial restraint provision to tainted assets, should prevail over this perceived purpose of preservation. The Court answered the criticism that its ruling runs counter to the intent of the statute by asserting that "the statute, as presently written, cannot be read any other way."[59] The Court noted that Congress could always amend the statute so that its plain language would conform to its intended purposes.[60] Likewise, section 1963 can only be read as precluding the pretrial restraint of substitute assets. If Congress believes that this reading frustrates a purpose of preservation, it can amend RICO to provide explicitly for the pretrial restraint of substitute assets.

C. *The Relevance of RICO's Liberal Construction Mandate*

The bill enacting RICO into law stipulated that its forfeiture provisions were to be "liberally construed to effectuate its remedial purposes,"[61] and the Supreme Court has agreed that RICO should be interpreted in this fashion.[62] Several courts have relied upon this liberal construction mandate in interpreting section 1963 as permitting the pretrial restraint of substitute assets.[63]

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57. 18 U.S.C. § 1963(d)(1) (1988).

58. 491 U.S. 600 (1989); *see supra* notes 29-32 and accompanying text.

59. 491 U.S. at 614.

60. 491 U.S. at 614. For a recent example of a court's emphasizing the plain meaning in the face of possible policy concerns to the contrary, see *In re* Moffitt, Zwerling & Kemler, 864 F. Supp. 527, 534-35 (E.D. Va. 1994). At issue in *Moffitt* was whether the court could require a law firm that had received and spent potentially forfeitable money from a defendant, to forfeit a sum equal to the amount originally subject to forfeiture. The court acknowledged that "[t]here is a visceral tendency to give a quick affirmative answer to this question . . . [and] conclude that the Law Firm should be required to pay it back from the Firm's other assets." 864 F. Supp. at 534-35. Yet the *Moffitt* court declined to follow this "visceral tendency," reflecting that "[i]f the power is not found in the statute, a court should avoid creating one by implication on policy grounds." 864 F. Supp. at 535. The court feared that by giving in to this temptation to amend the statute to conform with notions of policy, it would cross the "line that exists between principled but energetic judicial lawmaking and illegitimate usurpation of the legislative role." 864 F. Supp. at 535.

61. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

62. Russello v. United States, 464 U.S. 16, 27 (1983) (quoting Pub. L. No. 91-452 § 904(a), 84 Stat. 947 (1970)). § 853(o) of the CCE provides an identical liberal construction clause. 21 U.S.C. § 853(o) (1988).

63. *See, e.g., In re* Billman, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied sub nom.* McKinney v. United States, 500 U.S. 952 (1991); United States v. O'Brien, 836 F. Supp. 438, 441 (S.D. Ohio 1993); United States v. Wu, 814 F. Supp. 491, 493 (E.D. Va. 1993). The Fourth

These courts, however, have misunderstood the scope of that mandate. It merely requires courts to resolve any *ambiguity* in the forfeiture clause such that the remedial goals of the statute are served.[64] The mandate does not permit courts to amend the statute by judicial interpretation.[65] The Supreme Court recently acknowledged these limits on the liberal construction mandate, ruling that "[t]his [liberal construction] clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended."[66]

As discussed in section I.A, the language of section 1963(d)(1) is unambiguous; accordingly, courts need not even consider the liberal construction mandate. Construing the pretrial restraint measures of section 1963(d) as only applying to subsection (a) property because the section only refers to that property does not amount to the "overly narrow reading of the statute" that the liberal construction mandate was intended to avert. Moreover, interpreting section 1963(a), which only mentions tainted assets, as not including substitute assets is reasonable, given that RICO treats tainted assets and substitute assets very differently.[67] Therefore, courts should not use

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Circuit, for example, stressed that RICO's remedial purpose requires the preservation of defendant's assets for forfeiture if he is convicted. *In re* Billman, 915 F.2d at 921. The *Billman* court then simply concluded that given this remedial purpose, it could read RICO's pretrial restraint provision as implicitly referring to substitute assets as well. 915 F.2d at 921. This reasoning is similar to, but distinct from, the *Billman* court's assertion that the preservation purpose of § 1963(d) requires it to read an implicit reference to substitute assets into RICO's pretrial restraint provision. *See supra* notes 54-56 and accompanying text. The *Billman* court first indicated that this preservation purpose alone allows for the pretrial restraint of substitute assets. 915 F.2d at 921. The court then supported this conclusion by pointing to the liberal construction mandate as additional authorization for the entry of pretrial restraining orders against substitute property. 915 F.2d at 921.

64. The Supreme Court has commented that RICO's liberal construction clause " 'only serves as an aid for resolving ambiguity; it is not to be used to beget one.' " Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10 (1985)); *see also* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 290 n.150 (1982) ("[I]f RICO's language is plain, it ought to control; if the language is ambiguous, that construction which would 'effectuate its remedial purposes' . . . ought to be adopted."); Craig W. Palm, Note, *RICO and the Liberal Construction Clause,* 66 CORNELL L. REV. 167, 191 (1980) (concluding that "words should be given their plain meaning whenever possible" and that the liberal construction directive is only intended to guide courts when dealing with ambiguities). *See generally* Alan R. Romero, Note, *Interpretive Directions in Statutes,* 31 HARV. J. ON LEGIS. 211, 239 ("Even though interpretive directions may not say so explicitly, they generally operate only to resolve ambiguities in a statute.").

65. *See* United States v. Floyd, 992 F.2d 498, 502 (5th Cir. 1993) (noting that "this command for a liberal construction does not authorize us to amend by interpretation").

66. *Ernst & Young,* 113 S. Ct. at 1172. In *Ernst & Young,* the Court refused to extend liability under § 1962(c) of RICO because it read the language and legislative history as indicating that Congress intended to limit liability to those individuals who participate in the operation or management of an enterprise through a pattern of racketeering. 113 S. Ct. at 1172.

67. *See supra* notes 34-47 and accompanying text.

the liberal construction mandate to extend RICO's forfeiture powers to allow for the pretrial restraint of substitute assets — a "new purpose[ ] that Congress never intended."[68]

II. The Legislative History of Section 1963

This Part examines the legislative history of RICO's forfeiture provisions to determine whether there is any clearly expressed legislative intent that would permit the pretrial restraint of substitute assets. Although the substitute asset provision was enacted in 1986 without any accompanying legislative history, Congress considered adding virtually identical substitute asset provisions to RICO in 1982 and 1984, and useful legislative history accompanies both of these attempts.[69] Section II.A examines the legislative record behind the 1982 effort to add a substitute asset provision and identifies language plainly indicating that the pretrial restraint measures of RICO were not intended to cover substitute assets. Section II.B then looks at the 1984 attempt and explains that Congress amended RICO's pretrial restraint provision with the expectation that there would be a substitute asset measure as well. Given this expectation, the 1984 change from nonspecific to very specific language in RICO's pretrial restraint provision offers additional evidence that Congress did not plan for the pretrial restraint of substitute assets. This Part concludes that the legislative history offers no indication of any congressional intent that would justify ignoring the plain language of section 1963. In fact, the record surrounding Congress's previous efforts to add a substitute asset provision indicates that Congress specifically intended to limit RICO's pretrial restraint measures to tainted property.

A. *The 1982 Legislative History*

Congress considered a series of substantial amendments to RICO in 1982. Included among these proposed amendments was a substitute asset provision as well as the modification of RICO's pretrial restraint provision that passed two years later.[70] The accompanying committee report explicitly declares that the pretrial restraint amendment would apply only to tainted assets — assets that were then described in subsection (a)(2). The report states: "It should also be noted that the restraining order provision applies only to (a)(2) property. It may not be applied with respect to other assets

68. *Ernst & Young*, 113 S. Ct. at 1172. *See infra* Part II (concluding that the legislative history suggests that Congress did not intend for the pretrial restraint of substitute assets).

69. Congress also considered a substitute asset amendment in 1981, but the scant legislative history accompanying this attempt does not shed any light on Congress's views regarding the pretrial restraint of substitute assets. *See* S. Rep. No. 307, *supra* note 35, at 993-96.

70. *See* S. Rep. No. 520, 97th Cong., 2d Sess. (1982).

that may ultimately be ordered forfeited under the substitute asset provision."[71] This statement evinces a clear legislative mandate that section 1963's pretrial restraint measures should not extend to substitute assets.[72]

This mandate, of course, is found within legislative history for a bill that Congress did not pass.[73] But according to the Supreme Court, the legislative history of a previous unenacted bill is "wholly relevant" to an understanding of a later-enacted bill where the language of the two acts is substantially the same.[74] Here, the pretrial restraint and substitute asset provisions considered in 1982 are essentially identical to the measures that eventually passed into law.[75]

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71. *Id.* at 10 n.18. One court has attempted to discredit this legislative history by noting that the Senate Report states that RICO's pretrial restraint measures apply only to subsection (a)(2) property, whereas the present provision applies to subsection (a) property. *See* United States v. Schmitz, 153 F.R.D. 136, 139-40 (E.D. Wis. 1994). This distinction is immaterial. In the amendments to § 1963 considered in 1982, subsection (a)(2) encompassed almost exactly the same assets that subsection (a) does today. The present version of subsection (a) describes which forms of property are considered "tainted" and thus forfeitable upon conviction. *See* 18 U.S.C. § 1963(a) (1988). The 1982 version was structured somewhat differently. Subsection (a) was divided into two parts. Subsection (a)(1) set forth the other possible sanctions that may result from a RICO conviction, and subsection (a)(2) established what constituted "tainted" assets. *See* S. REP. NO. 520, *supra* note 70, at 23. Thus, the Senate Report referred to subsection (a)(2), instead of subsection (a), simply because at that time subsection (a) was formatted in a slightly different fashion.

72. Both the Third and Ninth Circuits have concluded that this statement unequivocally establishes that Congress did not intend for the pretrial restraint of substitute assets. *See* United States v. Ripinsky, 20 F.3d 359, 363-64 (9th Cir. 1994); *In re* Martin, 1 F.3d 1351, 1359-60 (3d Cir. 1993).

73. *See Schmitz*, 153 F.R.D. at 140. In attempting to discredit reliance on the 1982 report, the *Schmitz* magistrate asserted that the war against crime had escalated in the years following 1982 and concluded that "[i]t is therefore difficult to say that Congress's reasons, concerns and intentions at the time the substitute asset provision was enacted were the same as in 1982, when Congress declined to enact the provision." 153 F.R.D. at 140.

74. *See* United States v. Enmons, 410 U.S. 396, 404-06 (1973). In discussing the legislative history surrounding the Hobbs Act, the *Enmons* Court relied upon a statement made by Congressman Hobbs in introducing an earlier version of the bill that had only passed in the House of Representatives. The Court stressed that the earlier history was applicable because "the operative language of the original bill was substantially carried forward into the Act." 410 U.S. at 404 n.14.

75. The 1982 version of the substitute asset provision read in full:

(d) If any of the property described in subsection (a)(2) —
(1) cannot be located;
(2) has been transferred to, sold to, or deposited with, a third party,
(3) has been placed beyond the jurisdiction of the court,
(4) has been substantially diminished in value by any act or omission of the defendant, or
(5) has been commingled with other property which cannot be divided without difficulty,
the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

S. REP. NO. 520, *supra* note 70 at 24. The present version of RICO's substitute asset provision is quoted in full *supra* in note 27. A comparison of the two provisions reveals that they are essentially the same, with only two significant differences. First, the current version adds a due diligence requirement for property that "cannot be located" under subsection (1). Second, the 1982 amendment specifies in subsection (4) that the property must be diminished in

Accordingly, the 1982 committee report's statement regarding the limits of RICO's pretrial restraint measure offers strong evidence that Congress never intended for section 1963's restraints to apply to substitute assets.[76]

B. *The 1984 Legislative History*

In the Comprehensive Forfeiture Act (CFA) of 1984,[77] Congress reconsidered many of the amendments to RICO that were proposed in 1982 but never enacted.[78] This time Congress succeeded in substantially revising RICO's forfeiture provisions. For instance, Congress greatly expanded the scope of RICO's pretrial restraint provisions by permitting courts to enter preindictment restraining orders.[79] The CFA also included a substitute asset provision, but the provision was ultimately eliminated in a different section of the same act without any explanation in the legislative history.[80]

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value "by any act or omission of the defendant." In the final version, this requirement applies to all of subsection (m). 18 U.S.C. § 1963(m) (1988).

76. The magistrate judge in *Schmitz* also raised one other rather peculiar argument in endeavoring to discredit this statement in the 1982 report. The magistrate noted that this statement falls within a section of text that seems especially concerned with the constitutional implications of prior restraint measures. 153 F.R.D. at 140. This observation, however, does not detract from the statement's relevance as pertinent legislative history. First, the court is probably incorrect in its reading of this supposed context. *Schmitz* cites pages nine and ten of the committee report as manifesting a particular sensitivity to constitutional issues. 153 F.R.D. at 140 (citing S. REP. NO. 520, *supra* note 70, at 9-10). Yet on these two pages, the only conceivable indication of a constitutional concern is that the report devotes a footnote to listing several cases that consider whether a restraining order is incompatible with the presumption of innocence. *See* S. REP. NO. 520, *supra* note 70, at 10 n.19. The report does not appear to be especially concerned with the implications of this issue, for it subsequently expresses the view that "pretrial restraining orders for the purpose of preserving assets does not impinge on the trial concept of a presumption of innocence." *Id.* at 11.

Furthermore, even if one does read the surrounding text of the committee report as somehow revealing a concern with the constitutional reach of pretrial restraint measures, such an interpretation does not diminish the value of the statement as pertinent legislative history. It is difficult to understand the relevance of this supposed context. *Schmitz* seems to be advancing this alleged sensitivity to explain why the committee report explicitly limits the application of pretrial restraints to tainted property. However, the underlying motivation is of little concern here, for such a motivation cannot diminish the strength of a statement which plainly asserts that RICO's pretrial restraint measures do not apply to substitute assets. It does not matter why Congress decided to restrict RICO's restraint powers to tainted assets; all that is important is that the legislature, for whatever reason, did not intend for § 1963(d) to apply to substitute assets.

77. Pub. L. No. 98-473, 98 Stat. 2040.

78. *See supra* notes 5-9 and accompanying text (discussing the CFA).

79. This revision of RICO's pretrial restraint powers can now be found, essentially unchanged, at 18 U.S.C. § 1963(d) (1988).

80. The substitute asset provision was added in chapter three of the 1984 Act by § 302 of the CFA. Pub. L. No. 98-473, 98 Stat. 2040. In the same Act, however, § 2301(b) of chapter 23 further amended RICO by striking out the previously added substitute asset provision. Pub. L. No. 98-473, 98 Stat. 2192. The legislative history accompanying the 1984 Act discusses the substitute asset provision as if it were ultimately enacted and offers no explanation for why it was eventually withdrawn. No other source has been able to explain why this subsection was withdrawn. The Seventh Circuit has commented that "[t]he reason for the

That Congress considered a substitute asset provision at the same time it substantially revised RICO's pretrial restraint measures suggests that Congress drafted the present-day version of RICO's pretrial restraint provision with the expectation that RICO would also include a substitute asset provision. This expectation affects the interpretation of the legislative history in two ways.

First, it answers the argument that section 1963(d)(1) does not refer to substitute assets because RICO had no substitute asset provision at the time section 1963(d)(1) was enacted.[81] This argument proves meritless because Congress drafted the pretrial restraint amendment under the assumption that a substitute asset provision would exist as well. In fact, section 1963(d)(1)'s explicit reference only to tainted property, at a time when Congress presumed the existence of a substitute asset measure, supports the argument that Congress did not intend for the pretrial restraint of substitute assets.

Second, the presumption of a coexisting substitute asset provision is also of particular significance when one compares the amended version of RICO's pretrial restraint provision with the original enactment. Although the revised pretrial restraint provision specifies which type of assets may be restrained, the earlier version merely stated that courts could enter restraints "in connection with any property or other interest subject to forfeiture under this section."[82] Tainted assets were the only form of property subject to forfeiture when Congress drafted the original restraining order provision, so there was no need to specify which assets could be restrained. But Congress amended the pretrial restraint provision in 1984 with the assumption that there would now be two categories of forfeitable assets — substitute and tainted — thus creating the need to identify which type of property was covered. Accordingly, Congress's decision to change the wording of RICO's pretrial restraint provision from "any property or other interest subject to forfeiture" to "property described in subsection (a)" at the same time

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last-minute deletion of what would have been [the substitute asset provision] is unclear." United States v. Ginsburg, 773 F.2d 798, 801 n.2 (7th Cir. 1985). One congressman, in advocating passage of the substitute asset measure in 1986, noted that the provision was "part of the Comprehensive Crime Control Act when it left this House several years ago and similarly was passed in the other body. Somehow it got dropped out in conference." 132 CONG. REC. 22,962 (1986) (statement of Rep. Lungren).

81. No court has raised this specific argument. *But cf.* United States v. Schmitz, 153 F.R.D. 136, 139-40 (E.D. Wis. 1994). The court in *Schmitz* raises a similar chronological argument in concluding that the substitute asset provision was meant to supplement the tainted asset provision. The opinion uses the fact that substitute assets were added to § 853 well after the tainted asset provision to explain why the tainted asset provision does not specifically refer to substitute assets. 153 F.R.D. at 139; *see supra* note 51 and accompanying text.

82. Pub. L. No. 91-452, 84 Stat. 922, 1098 (codified as amended at 18 U.S.C. § 1963(d) (1988)).

that it created another form of property hardly seems coincidental. This change from nonspecific language to very specific language appears to indicate a conscious choice by Congress to limit RICO's pretrial restraint measures to tainted funds.

III. Congressional Reasons for Treating Substitute Assets Differently From Tainted Assets

Although the plain statutory language and legislative history of section 1963 make it clear that Congress did not intend for courts to apply RICO's pretrial restraint measures to substitute assets, at first blush, this conclusion seems at odds with RICO's particularly expansive nature. RICO is renowned for its extremely broad application and potentially severe penalties. The Seventh Circuit has described RICO as a "statute of exceedingly broad scope,"[83] and the Supreme Court has agreed that RICO was "intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[84] A recognition of RICO's breadth seems to motivate those courts that permit the pretrial restraint of substitute assets. Implicit in these various courts' opinions is a failure to understand why Congress, which historically has worked to expand RICO to an unprecedented scope, would balk at the notion of the pretrial restraint of substitute assets.[85]

This Part addresses this confusion and explains why it makes sense for RICO to limit section 1963's pretrial restraint measures to tainted property. It argues that the greater care that is required for pretrial impositions on assets unconnected with the illegal activity justifies the differential treatment RICO gives to substitute assets.[86]

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83. United States v. Ginsburg, 773 F.2d 798, 802 (7th Cir. 1985).

84. Russello v. United States, 464 U.S. 16, 26 (1983); *see also* Palm, *supra* note 2, at 27 ("The most striking aspect of RICO's forfeiture provisions is their unprecedented nature and breadth.").

85. Professor Palm has observed that this sensitivity to RICO's broad application does affect judicial reasoning at times. He notes that the expansive language of RICO's forfeiture provisions has sometimes prompted courts to conclude summarily that certain assets are forfeitable or to ignore whether the forfeiture sought by the prosecution is permitted by any specific language of § 1963. Palm, *supra* note 2, at 27-28.

86. *But see* King, *supra* note 2. King argues that Congress should amend RICO to provide explicitly for the pretrial restraint of substitute assets. King, *supra* note 2, at 269. He sees two justifications for the imposition of § 1963(d) restraints on substitute property. He asserts that the pretrial restraint of substitute assets would preserve the availability of such assets for postconviction forfeiture proceedings and would firmly establish the proper court's jurisdiction over the potentially forfeitable property. *Id.* at 271-72.

Although King advocates allowing the pretrial restraint of substitute assets, his argument nonetheless lends support to the notion that there are reasons to limit pretrial restraint powers to tainted property. King acknowledges that the imposition of pretrial restraints on substitute assets could potentially impair the accused's ability to provide for basic living expenses. *Id.* at 287-88; *see infra* notes 94-97 and accompanying text (commenting further on the potential hardships associated with pretrial restraining orders). In fact, he argues that in amending RICO to allow for the pretrial restraint of substitute assets, Congress should also

Section III.A first notes that Congress expressed greater concern for defendants' rights at preconviction stages of the trial process. It then argues that not allowing pretrial restraint of substitute assets is consistent with RICO's heightened protection of defendants' rights at the pretrial stage. Section III.B maintains that defendants deserve less protection for their tainted assets because they are not legally entitled to such ill-gotten gains. Substitute assets, on the other hand, lack a nexus with the illegal conduct, and thus Congress had good reason to exercise caution when drafting legislation that permits the government to restrain substitute assets. This Part concludes that in light of the strict safeguards that Congress imposed on preconviction proceedings, it is not surprising that the legislature would refuse to extend RICO's pretrial restraint measures to substitute assets.[87]

A. *The Importance of Timing in Section 1963: Pre- and Postconviction Proceedings*

The level of procedural protection defendants receive in RICO's forfeiture proceedings depends in large measure on the phase of the prosecution in which they fall.[88] This disparate treatment of a defendant's assets depending on the phase of the prosecution makes a great deal of sense. It remains a fundamental tenet of our criminal justice system that the accused is presumed innocent

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add a specific description of the hearing process to be used when the government seeks the extension of restraints on substitute assets beyond the mere ten-day temporary restraint order set forth in § 1963(d)(2). King, *supra* note 2, at 283-86; *see infra* notes 99-100 and accompanying text (describing the hearing procedure for § 1963(d)(2) restraints). King calls for a formalized hearing process because he perceives an inherent potential for abuse in the pretrial restraint of substitute assets. In addition to affording the court an opportunity to make allowances for basic living expenses, the hearing is also intended to provide a check against abuses by the prosecution. King argues that the hearing should ensure that tainted assets are actually unavailable and that the prosecution has not overstated the value of such tainted assets or understated the value of the restrained substitute property. King, *supra* note 2, at 285-86.

87. The plain language of § 1963, as discussed in Part I, and the relevant legislative history, as discussed in Part II, indicate that RICO does not provide for the pretrial restraint of substitute assets. Although Congress has made it clear that RICO's pretrial restraint measures are not designed to cover substitute assets, it has never explained the reason for this result. This Part attempts to fill this void by offering a possible reason. Even if one rejects the explanation offered in this Part, it does not follow that RICO must then provide for the pretrial restraint of substitute assets. This Note's conclusion that RICO's pretrial restraint measures do not apply to substitute assets stands firmly on the plain language and legislative history alone; Part III merely endeavors to explain why this conclusion makes sense.

88. *See* Palm, *supra* note 2, at 19 ("The mechanisms and attendant procedures [of § 1963(d)] vary depending upon when in the criminal process the government seeks relief."); Michael L. Sheier, Comment, *The Bill of Rights Becomes the Latest Casualty in the War on Drugs and Organized Crime — Surprisingly, Forfeiture of Attorney Fees is Consistent with the Fifth and Sixth Amendments to the United States Constitution*, 59 U. CIN. L. REV. 905, 936 (1991) (interpreting the structure of § 853 as indicating that "Congress contemplated that the role and power of the court would change depending on the juncture in the forfeiture proceeding").

until the trier of fact finds guilt beyond a reasonable doubt.[89] Of course, this presumption of innocence does not bar the imposition of all forms of restraint on the accused or the accused's property before a conviction. Courts may, for instance, deny bail where the defendant is deemed to present a serious threat to the safety of the community.[90] But the presumption of innocence does at least indicate that the interests of the accused should merit special consideration before guilt is determined.

Moreover, the risk of erroneous deprivation of the defendant's property is far greater in the early stages of a prosecution. By the time of conviction, the defendant has had a full opportunity to make use of the truth-finding abilities of the adversarial process. At earlier stages, the defendant has not yet had this full opportunity, and thus the potential for error is much more significant. This risk is particularly real for the several preconviction proceedings, such as the imposition of section 1963(d)(2) restraints, that are conducted ex parte.[91] For example, in *Martin,* the government initially sought the imposition of pretrial restraints on well over fifteen million dollars, but a subsequent indictment alleged that only six million dollars were tainted.[92] *Martin* demonstrates the kind of mistakes the government can make in the early stages of a prosecution.[93]

The presumption of innocence and the potential for error require that courts exercise caution in imposing on a defendant's assets in pretrial settings, especially because restraining orders are such powerful weapons.[94] Several courts have recognized that the entry of pretrial restraints may impose great hardship on the accused.[95] Restraining orders can deny a defendant access to most or even all of his assets, and he may require the use of at least a por-

89. The Supreme Court has repeatedly emphasized the importance of the presumption of innocence doctrine. *See, e.g.,* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice."); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

90. *See* United States v. Salerno, 481 U.S. 739 (1987) (upholding the Bail Reform Act of 1984's preventive detention measures against constitutional challenge).

91. One commentator has noted that in a nonadversarial ex parte proceeding, "there is a substantial risk that the order will erroneously deprive a defendant of his property interests." King, *supra* note 2, at 279; *cf.* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501 (1993) ("The practice of ex parte seizure . . . creates an unacceptable risk of error.").

92. 1 F.3d 1351, 1354-55 (3d Cir. 1993). The facts of *Martin* are summarized *supra* note 14.

93. 1 F.3d at 1354-55.

94. *See* United States v. Ripinsky, 20 F.3d 359, 365 (9th Cir. 1994) (describing the CCE's pretrial restraint measures as a "drastic remedy").

95. *See, e.g.,* United States v. Harvey, 814 F.2d 905, 928 (4th Cir. 1987); United States v. Thier, 801 F.2d 1463, 1476 (5th Cir. 1986) (Rubin J., concurring); *see also* King, *supra* note 2 at 288 ("A complete pretrial restraint on the means needed to pay ordinary living expenses

tion of them to provide for the basic necessities of life. Moreover, pretrial restraints may also impose hardships on those individuals who are financially dependant on the accused.[96] For instance, a widower with several dependent young children, if subjected to section 1963(d) restraints, might suddenly lack the funds to provide his children with clothes, food, and medical care.[97]

The need for greater caution in restraining assets in the early stages of a prosecution is expressed in RICO's forfeiture section, for that provision's approach toward a defendant's assets turns on the phase of the prosecution. In preindictment proceedings, RICO provides the strongest measures for safeguarding the rights of the defendant. Courts must satisfy several strict requirements before entering any form of restraint against potentially forfeitable property.[98] If notice to the interested parties and an opportunity for a hearing are not provided, the court may only impose a temporary restraining order with a time limit of up to ten days.[99] Moreover,

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irreparably imposes the economic impact of forfeiture on the defendant and his dependents before a trial and conviction have occurred.").

These potential burdens are exacerbated when RICO's pretrial restraint provision is applied to substitute assets. When § 1963(d) restraints are imposed on tainted assets, there is at least the strong possibility that the defendant and any dependents will be able to rely on some other form of untainted property to provide for the basic necessities of life. When courts extend these restraints to all forms of assets, however, the probability that a defendant will be unable to reach enough of his assets to pay for basic living expenses naturally increases. *See Ripinsky*, 20 F.3d at 365 (describing the CCE's pretrial restraint measures as a "drastic remedy," and remarking that to extend subsection (d)'s restraint powers to substitute assets would be "an even more powerful weapon").

96. The defendant facing a RICO prosecution usually has the option to waive bail and remain in jail, where he will be at least assured of receiving food and shelter. His dependents, however, do not have such an option.

97. Judge Alvin Rubin has described the hardships that may result from the imposition of pretrial restraining orders. *See Thier*, 801 F.2d at 1476. In *Thier*, the defendant challenged the imposition of a restraining order on several grounds, one of which was the district court's failure to exempt some assets from restraint so that he could provide for his basic living expenses. 801 F.2d at 1466. The Fifth Circuit agreed that the trial court should at least have considered the defendant's need for living expenses. 801 F.2d at 1471. Concurring in the result, Judge Rubin filed a separate opinion in which he emphasized the potential hardships that might be imposed by the entry of a restraining order. He noted that if the defendant "has no money to buy food or to pay for housing, he might waive his right to release on bail and go to jail, but . . . his family would remain stripped of all means of support — without the option of reporting to jail — though accused of no crime." 801 F.2d at 1476. To Judge Rubin, this potential result "should shock the judicial conscience at least as much as does the assertion that the prosecution may pump the stomach of an accused person in order to obtain evidence." 801 F.2d at 1476.

Furthermore, because RICO's pretrial restraint provision allows for the entry of restraining orders before an indictment, the accused might not even be arrested yet, and thus not have the option to remain in jail. Of course, preindictment restraining orders are subject to stringent time limits. *See infra* notes 99, 105, and accompanying text. Still, the defendant's inability to use his assets for even a brief period of time may impair his ability to provide for certain basic necessities.

98. 18 U.S.C. § 1963(d) (1988).

99. 18 U.S.C. § 1963(d)(2) (1988). This ten-day limit may be extended if good cause is shown or the affected party consents to further restraints. 18 U.S.C. § 1963(d)(2) (1988).

the prosecution must show that there is probable cause to believe that the disputed property would be subject to forfeiture in the event of a conviction and that notifying the defendant would "jeopardize the availability of the property for forfeiture."[100]

If the prosecution desires some action more substantial than a ten-day temporary restraining order but has not yet filed an indictment or information, it must satisfy an even stricter test. First, notice and an opportunity for a hearing must be provided to the parties appearing to have an interest in the disputed property.[101] Second, the prosecution must establish that there is a "substantial probability" that the assets would be forfeited and that the failure to impose restraints immediately would result in the assets being made unavailable for forfeiture.[102] Third, the court must determine that the need to preserve the availability of the property outweighs any hardship on the parties subject to the restraint.[103] When these three requirements are met, a court may enter a restraining order or injunction, require a performance bond, or take any other action to preserve the assets.[104] Yet even these more substantial actions are limited in duration, for courts may only impose preindictment restraining orders for up to ninety days.[105]

Once the prosecution has filed an indictment or information charging the defendant with a RICO violation, these stringent requirements and limitations are lifted.[106] The prosecution no longer needs to demonstrate that there is a substantial probability of ultimate forfeiture and risk of losing the assets or that the need for restraint is so great that it outweighs any hardship to the affected parties. Instead, the indictment or information need only allege that the property sought to be restrained would be subject to forfeiture in the event of conviction.[107] Furthermore, unlike preindictment orders, there are no specific time constraints; the restraints may last as long as necessary. Still, even after an indictment, the government's power over a defendant's assets is limited to restraint measures designed to preserve the availability of property for any ultimate forfeiture. Despite allegations of wrongdoing, the defendant retains his interest in the potentially forfeitable assets.

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100. 18 U.S.C. § 1963(d)(2) (1988).

101. 18 U.S.C. § 1963(d)(1)(B) (1988).

102. 18 U.S.C. § 1963(d)(1)(B)(i) (1988).

103. 18 U.S.C. § 1963(d)(1)(B)(ii) (1988).

104. 18 U.S.C. § 1963(d)(1) (1988).

105. 18 U.S.C. § 1963(d)(1) (1988). As with subsection (d)(2) restraints, this time limit may be extended upon a showing of good cause or upon the filing of an indictment or information. 18 U.S.C. § 1963(d)(1) (1988).

106. 18 U.S.C. § 1963(d)(1)(A) (1988).

107. 18 U.S.C. § 1963(d)(1)(A) (1988).

Upon conviction, however, any protection for a defendant's property completely dissipates.[108] The defendant loses all rights to his tainted assets; such property is automatically forfeited to the government.[109] Moreover, if any portion of these funds are unavailable, the court may order the defendant to make up the difference through the forfeiture of untainted, substitute assets.[110]

The foregoing analysis shows that with respect to impositions upon tainted assets, Congress has provided greater procedural protections for defendants at the early stages of a prosecution. It is entirely consistent, therefore, for Congress to provide greater procedural protections for substitute assets during pretrial stages.

B. *Congressional Concern About Substitute Assets*

As demonstrated in section I.B, RICO treats tainted and substitute assets differently.[111] Congress displayed far greater caution in dealing with substitute assets than with tainted assets: RICO provides that courts may only order the forfeiture of substitute assets as a "last-resort" measure.[112] This more cautious approach makes sense, given that defendants obtain substitute assets through legitimate activities. Accordingly, the government should not restrain such property without providing considerable procedural safeguards.

By contrast, the government may more readily restrain tainted assets. In *Caplin & Drysdale v. United States,*[113] the Supreme Court drew an analogy between tainted assets and robbery proceeds that helps explain why a defendant has no legitimate possessory interest in tainted property. In *Caplin & Drysdale,* the Court held that the CCE's restraint provision does not impinge upon the defendant's Sixth Amendment right to an attorney of his choice.[114] In so holding, the Court compared tainted assets under the CCE to the proceeds of a robbery. The Court stated that a "robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney," because "[t]he money, though in his possession, is not rightfully his."[115] Because tainted assets, like the proceeds of a robbery, are not rightfully in the defendant's posses-

108. *See* Scheier, *supra* note 88, at 936 (concluding that "it is not bold to speculate that the Congress intended to treat the assets of a convicted criminal different[ly] than the assets of an accused prior to an adjudication of guilt").

109. 18 U.S.C. § 1963(a) (1988).

110. 18 U.S.C. § 1963(m) (1988).

111. *See supra* notes 34-47 and accompanying text.

112. *See supra* notes 37-47 and accompanying text (discussing the safeguards imposed on dispositions of a defendant's substitute assets).

113. 491 U.S. 617 (1989).

114. 491 U.S. at 624-33.

115. 491 U.S. at 626.

sion, the defendant has no legitimate possessory interest in the assets, and RICO may therefore provide for their restraint before conviction.

This rationale, however, does not extend to assets which lack a nexus with the illegal conduct. Substitute assets are acquired in a legal manner and are not subsequently used to further an illegal purpose. The defendant therefore should have a legitimate possessory interest in them. Given this legitimate interest, it is logical for Congress to be concerned about the adverse impact on the defendant whose substitute assets are frozen under RICO's pretrial restraint powers.

The cautious approach required by substitute assets' lack of a connection with an illegal activity explains why Congress might refuse to authorize the pretrial restraint of substitute assets. The 1986 enactment of a substitute asset provision indicates that Congress finally decided that the forfeiture of assets that have no nexus with the RICO offense is a necessary tool in the war against organized crime. The ultimate forfeiture of such assets is only a postconviction remedy, however, and as discussed above,[116] RICO's forfeiture provisions manifest far less concern with defendant's property interests[117] once the trier of fact has determined guilt beyond a reasonable doubt. Consequently, even though Congress has decided that postconviction confiscations of substitute assets are allowable, it does not necessarily follow that Congress has also concluded that preconviction impositions are permissible as well. Indeed, because Congress's legislative efforts with respect to RICO indicate a cautious approach toward both pretrial phases and substitute assets, it seems consistent for Congress to refuse to give courts the authority to reach property with no connection to the crime before trial.

CONCLUSION

RICO's forfeiture provisions do not permit the pretrial restraint of substitute assets. The pretrial restraint provision's explicit reference only to *tainted* assets indicates that courts do not have the authority to enter restraining orders against substitute assets. In addition, the legislative history accompanying RICO lacks any clear expression of contrary intent that would permit courts to ignore the plain language of the statute. Instead, this history reveals Congress's desire to limit RICO's restraint powers to tainted funds. Congress also had good reasons not to allow for the pretrial restraint of substitute property. RICO is much more circumspect

116. *See supra* Part III.A.

117. Often, third-party rights are also implicated by RICO's pretrial restraint measures, since an innocent third party may claim an interest in the property subject to § 1963(d) restraints.

when dealing with both pretrial proceedings and substitute assets than with postconviction proceedings and tainted assets. Given this concern about RICO's reach in pretrial phases and with regard to substitute assets, it does not seem surprising that Congress provided for the forfeiture of substitute assets upon conviction but balked at the restraint of such property before trial. Accordingly, when future courts are faced with government requests for the entry of restraining orders against substitute assets, they should decline the opportunity to stretch an already expansive provision to include *all* of a defendant's assets.